United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

B Pls

74-1845

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

FRANCINE NEWMAN,

Appellant,

- against -

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK,

Respondent.

- x

T-2391

APPELLANT'S BRIEF

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NEW YORK EDUCATION LAW SECTION 2568

The superintendent of schools of a city having a population of one million or more shall be empowered to require any person employed by the board of education of such city to submit to a medical examination by a physician or school medical inspector of the board, in order to determine the mental or physical capacity of such person to perform his duties, whenever it has been recommended in a report in writing that such examination should be made. Such report to the superintendent may be made only by a person under whose supervision or direction the person recommended for such medical examination is employed. The person required to submit to such medical examination shall be entitled to be accompanied by a physicial or other person of his own choice. The findings upon such examination shall be reported to the superintendent of schools and may be referred to and considered for the evaluation of service of the person examined or for disability retirement.

STATEMENT OF ISSUES

POINT I

HAS THE DISTRICT COURT ERRED IN DISMISSING APPELLANT'S COMPLAINT ON THE GROUND THAT THE STATE COURT JUDGMENT WAS *RES JUDICATA* IN BAR OF HER FEDERAL CLAIM?

POINT II

IS THE CONSTITUTIONAL QUESTION SUBSTANTIAL?

STATEMENT OF THE CASE

This is an appeal from the District Court's (Travia, J.) dismissal of the appellant's complaint on the ground that a prior New York State Court judgment is res judicata in bar of the Federal action.

In the District Court the appellant brought an action pursuant to Title 28 U.S.C. §§ 1131(a), 1343 and 2201, et seq. as authorized by Title 42 U.S.C. § 1983 for a declaratory judgment and appropriate equitable relief, against the respondent on the ground that the action of the respondent in placing her on involuntary medical leave, without pay, was contrary to due process of law under the Fourteenth Amendment of the United States Constitution and under Title 42 U.S.C. § 1983. The appellant also challenges the constitutionality of Section 2568 of the New York Education Law.

The appellant is a tenured, licensed teacher in the New York School system. She was continuously employed as such from 1952 through September 11, 1970, when she was placed on involuntary medical leave of absence as more fully set forth hereinbelow.

In January of 1970 the Principal of Far Rockaway High School, to which the appellant was assigned, wrote a letter to the Superintendent of Schools, requesting that a medical examination be given to the appellant to determine her mental capacity to perform her duties on the basis of a "report" which he annexed to the request.

Despite the fact that the "report" was filled with false statements and distortions which could without difficulty be proven to be false were any hearing accorded the appellant, pursuant to the provisions of Section 2568 of the New York Education Law, the plaintiff was directed to submit to examination by two physicians and a psychologist employed by the respondent.

Thereafter on July 10, 1970, Theodore H. Lang, Deputy Superintendent of Schools, wrote to the appellant's principal, Mr. Gordon, and advised him as follows:

> "I wish to inform you that the School Medical Director submitted a report dated July 7, 1970 which contains the following recommendation:
>
> "'Not fit at present for teaching duty',
>
> "'Leave of absence for purpose of health improvement till June 30, 1971."

The submission of this report resulted in the appellant's being placed on involuntary medical leave of absence, without pay, from September 11, 1970 through June 30, 1971.

It was only after seven written requests that a copy of the medical report upon which the appellant's determination was based was sent to the respondent's doctor. Insofar as this report relates to the appellant's condition, it states as follows:

> "This teacher was examined in the Medical Division February 13, 1970 and by a psychiatric consultant on February 26, 1970. The consensus of these examinations was that she had a psychoneurosis; a passive aggressive personality disorder characterized by poor judgment, lack of insight, explosive and impulsive behaviour which impaired her ability to perform her duties."

On September 25, 1971, three months after the expiration of her forced leave of absence from September 11, 1970 through June 30, 1971, the appellant was belatedly required by the respondent to report for medical examination by its employee doctors to determine her fitness to return to work.

Although two of the doctors who examined the appellant on behalf of the respondent stated in the presence of the appellant and Mrs. Gladys Roth, a Field Representative of the United Federation of Teachers, that there was no medical support for placing the appellant on a forced leave of absence, the defendant again required the appellant to

report for examination by one of its panel psychiatrists.

Following this examination, the contents of which are unknown to the appellant, she was again placed on involuntary medical leave from September 10, 1971 through June 30, 1972, without pay.

The Appellant at no time since the inception of proceedings under section 2568 of the New York Education Law has had access to the medical records upon which the respondent's decisions were based, she has not had a hearing, the opportunity to confront the witnesses against her or the opportunity to rebut any of the medical reports in her file, to say nothing of the allegations contained in the "report", which initiated the defendant's actions.

At the time she was placed on involuntary medical leave, the appellant was employed at an annual salary of $16,500.

Because of the respondent's action the appellant has been branded as a psychiatrically disabled, mentally ill person and has been unable to obtain employment in her profession.

The appellant commenced a proceeding in the New York Supreme Court, Kings County, pursuant to Article 78 of

the New York Civil Practice Law and Rules. In that proceeding she sought an order of the court vacating and annulling the respondent's determinations to place her on involuntary medical leave as having been made in an arbitrary, capricious and unreasonable manner and being based upon inaccurate information.

As to the respondent's order placing the appellant on involuntary medical leave of absence from September 11, 1970 through June 30, 1971, the State Court held that the proceeding was barred by the four month statute of limitations provided in Article 78 of the New York Civil Practice Law and Rules.

As to the second period of involuntary medical leave, the State Court held that the respondent had not submitted an adequate record for the Court to reach a determination on the merits and remanded the cause to afford the respondent an opportunity to cure the defective record.

The respondent then sought another psychatric examination of the appellant. The appellant refused to undergo any further examination.

The New York Appellate Division, Second Department and the New York Court of Appeals denied appellant's motions for leave to appeal.

POINT I

THE DISTRICT COURT ERRED IN DISMISSING APPELLANT'S COMPLAINT ON THE GROUND THAT THE STATE COURT JUDGMENT WAS RES JUDICATA IN BAR OF HER FEDERAL CLAIM.

A. The federal and state claims are based upon causes of action.

Appellant's Federal claim under Title 28 U.S.C., Section 1331(a) and 2201, et seq. is authorized by Title 42 U.S.C., Section 1983. Appellant seeks redress for deprivation of her civil rights and a declaration that Section 2568 of the New York Education Law is unconstitutional.

The appellant's state action was brought to annul and set aside an administrative determination on the ground that it was arbitrary, capricious and unreasonable. It was a so-called "Article 78" proceeding, pursuant to Section 7801, et seq. of the New York Civil Practice Law and Rules. Section 7803, NYCPLR limits the application

of the Article.*

The due process claims presented in the District Court were not raised in or determined by the state court. The state proceeding was not a proper vehicle to test constitutionality. Matter of Jerry v. Board of Education, 44 A.D. 2d 198 (4th Dept., 1974); Robbins v. Police Pension Fund, 321 F. Supp. 93.

Although an Article 78 proceeding may properly challenge the unconstitutional application of a constitutional ordinance (Matter of Diocese of Rochester v. Plan. Bd., 1 N.Y. 2d 508, (1956)) or the constitutional authority

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* Section 7803 provides:

> The only question that may be raised in proceeding under this article are:
>
> 1. whether the body or officer failed to perform a duty enjoined upon it by law; or
>
> 2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
>
> 3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure of mode of penalty or discipline imposed; or
>
> 4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence. As amended L. 1962, c. 318, § 26.

of local governing bodies to enact local laws in the face of contrary provisions in the State Constitution and statutes (Matter of P.B.A. of Westchester Cty., Inc. v. Bd. of Trustees of Village of Croton-on-Hudson, 21 A.D. 2d 693 (2d Dept., 1964)), the proceeding is improper for the presentation of a direct constitutional challenge. (Matter of Diocese of Rochester v. Plan. Bd., supra; Overhill Bldg. Co. v. Delaney, 28 N.Y. 2d 449; Lakeland Water Dist. v. Onondaga County Water Auth., 24 N.Y. 2d 400; Matter of Jerry v. Bd. of Education, supra.)

The cases cited are in accord with the principle that a party may not seek to avail himself of the remedies afforded by an enactment and attack the validity of the enactment in the same proceeding.

B. The State Court judgment was not on the merits.

Despite the New York Supreme Court's written opinion on the issues, by the court's language, it is clear that the proceeding was biased by the Statute of Limitations which was pleaded as an affirmative defense. (R., 167)

Justice Heller held:

> "In any event, the letter dated July 31, 1970 was a determination placing her on inactive status and granting a leave of absence. She exhausted her administrative remedies with respect to that determination on September 28, 1971, the date of the arbitrator's award. This proceeding was commenced on March 2, 1972. There was no compliance with the four-month period of limitation set forth in CPLR

217. (Matter of Napolitano v. Murphy, 28 A.D. 2d 852; Matter of Alliano v. Adams, 2 A.D. 2d 532, affd. 3 N.Y. 2d 801; Matter of Colodney v. New York Coffee and Sugar Exchange, Inc., 2 N.Y. 2d 149). (P. ,)

Article 78 proceedings are governed by the limitations contained in Section 217 of the NYCPLR which provides:

> "Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact, or after the respondent's refusal, upon the demand of the petitioner or the person whom he represents to perform its duty; or with leave of the court where the petitioner or the person whom he represents, at the time such determination became final and binding upon him or at the time of such refusal, was under a disability specified in section 208, within two years after such time.
> L. 1962, c. 308, eff. Sept. 1, 1963."

The state court judgment is thus final as barring the appellant's claim for the period from September 11, 1970 through June 30, 1971 and constitutes an indeterminate, unappealable order as to the period from September 10, 1971 to the present.

The New York Appellate Division and Court of Appeals orders denying the appellant leave to appeal were not affirmance on the merits. What has been determined finally by the State Court is that appellant is foreclosed from the relief she sought therein by application of the Statute of Limitations.

C. The Constitutional issues raised by the

District Court pleadings were not raised or determined in the State Court.

The cases cited in the District Court's opinion as authority for its holding that the state judgment is in bar of the Federal action are misconstrued.

In Tang v. Appellate Division, 1st Dept., 487 F. 2d 138 (2nd Cir., 1973) it was conceded that the appellant raised the same constitutional issues in his state and federal actions.* And this Court held, at p. 142: ". . . that a prior state court decision adjudicating federal constitutional questions is binding as res judicata in a subsequent federal action." In Tang, there was no question ". . . that the state court had jurisdiction of the person and subject matter here involved." The same factor barred federal jurisdiction in Gant v. Cole, 363 F. 2d 244 (2nd Cir. 1959), also relied on by the District Court. At bar, the constitutional issue was not raised or determined in the state court.

Tayler v. N.Y.C.T.A.; 433 F. 2d 665 (2nd Cir., 1970), cited in Tang, supra, and in the District Court's decision, is also clearly distinguishable from the case at

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*Although we respectfully disagree with the District Court's statements regarding either the availability or, on these facts, the efficacy of New York Education Law, Section 310, it is clear that there was no state provision for an irrevocable election of remedies as in the Tayler case.

bar. In the Tayler case, the state court had made a finding of fact as to a pivotal claim on which the appellant sought to involve federal jurisdiction. Moreover, Mr. Tayler, unlike the appellant here, had been accorded with an administrative hearing and appeal on the merits of his claim and then irrevocably elected under the state statutory scheme to pursue his appeal to a higher administrative tribunal rather than to the state courts. This court said, at p. 671 of 433 F. 2d:

> "Appellant has made his statutory election, and by his own omission effectively tied the hands of the New York courts, whose judgment we feel bound to honor. He must now live with his decision."

The appellant here made no such election and, indeed, none was open to her. She was not afforded an administrative hearing nor was any administrative appeal available to her.

Other cases cited in the District Court's opinion as a basis for dismissal of the appellant's complaint, are also inapposite. In Bricker v. Crane, 468 F. 2d 1228 (1st Cir., 1972), the relief under the Civil Rights Act was denied because the appellant, who sued a private hospital, alleged a private conspiracy against a class not recognized under the Civil Rights Law and because the state court had made a binding determination that the respondent

was not acting under color of state law. At bar, no conspiracy is alleged, and the respondent does not deny that it was acting under a state law, the constitutionality of which appellant here challenges. In Olson v. Board of Ed., etc., 250 F. Supp. 1000, appeal dismissed, 267 F. 2d 565 (1966), the court dismissed the complaint because it did not state a cause of action. Actually, the Olson court's language at p. 1004 and 1005 of 250 F. Supp. is in aid of the appellant's position herein:

> "The state majority neither discussed nor purported to decide this [constitutional] issue but, instead, determined the powers of the Commissioner were all but absolute, that his administrative action under the New York Education Law was not arbitrary or illegal . . . In view of these grounds it can reasonably be said that the . . [New York Court] had not directly included the federal constitutional question and accordingly that decision has 'no relation to our decision here.'"

The Olson holding insofar as it addresses the issues before this Court, is that res judicata bars a federal suit only where the parties' claims, both state and federal were fully adjudicated in a prior state court action. In Frazier v. East Baton Rouge Parish School Bd., 363 F. 2d 861 (5th Cir., 1966), the appellant had a full hearing prior to his dismissal and the School Board's action was sustained by the state court. In the federal court, for the first time, a charge of racial bias was

raised. The court held, at p. 862:

> "If a state administrative action is first challenged in the state court and the state court acts judicially, the state court decision is res judicata and bars a decision by a federal court. [Citations omitted] Under the doctrine of res judicata, where the second cause of action is based upon the same cause of action which the first cause of action was based, the judgment is conclusive as to all matters which were litigated or might have been litigated in the first cause of action." (Emphasis added by the court.)

The Bricker holding is proper and, in effect merely a restatement of the rule that in reviewing an action based upon a record, one may not go outside of the record to challenge the action. The principle in no way defeats appellant's federal standing, for in her case, there was no hearing and there is no record. Further, and more importantly, the appellant here attacks the constitutionality of the state law and procedures under which the respondents acted. In none of the cases cited by the District Court and here distinguished, was a state statute challenged, except in Tang v. App. Div., 1st Dept., supra, and in Tang the court found the challenge had been finally disposed of on the merits in the state court.*

Since the state and federal causes of action are not the same, the doctrine of res judicata does not bar the

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* In Tang there is the added element of the state court's administration of the State Bar which appeared to influence the federal court's determination not to pass on the issues.

federal claim. Cf. Cromwell v. County of Sacramento, 94 U.S. 351, 24 L. Ed. 195; Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 68 S. Ct. 715, 92 L. Ed. 898; Sea-Land Services, Inc. v. Gaudet, U.S. , 945 S. Ct. 806, L. Ed. .

POINT II

THE CONSTITUTIONAL QUESTION IS SUBSTANTIAL

The appellant was at the time she was placed on involuntary medical leave, without pay, a tenured teacher with an outstanding record for more than 20 years. Then, under the statute and procedures here challenged, on the basis of the terse statement "not fit at present for teaching duty" (R., 91) She was out of work and branded as a psychiatric invalid.

After seven written requests for the medical reports which resulted in the respondent's action, she received a copy of a report which stated:

> "The consensus of these examinations was that she had a psychoneurosis; a passive aggressive personality disorder characterized by poor judgment, lack of insight, explosive and impulsive behavior which impaired her ability to perform her duties." (R.,)

No hearing or evidenciary procedure, or opportunity for appellant to contest her dismissal is available to

her under the challenged statute and procedures.* The procedure, which resulted in appellant's being placed on disability status without salary, consisted in the brief examinations by members of the respondent's medical staff.

The appellant has suffered grevious loss, both of employment and reputation, without due process of law; the basic requisite of which is the opportunity to be heard at a meaningful time and in a meaningful manner. Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287.

Due process requirements have been imposed even upon that class of cases which do not touch upon vested rights such as /the appellant's position of tenure.

> "As Mr. Justice Blackman has written recently, 'This Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege."' Graham v. Richardson, 403 U.S. 365, 374, 91 S. Ct. 1848, 1853, 29 L.Ed. 2d 534. Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grevious loss.' Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S. Ct. 624, 646, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring), quoted in Goldberg v. Kelly, 397 U.S. 254, 2 3 90 S. Ct. 1011, 1018 25 L.Ed. 2d 287 (1970). The question is not merely the 'weight' of the individual's interest but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment. Fuentes v. Shevin, 405 U.S. ____, 92 S. Ct. 1983, 31 L.Ed. 2d _____ (decided June 12, 1972)."

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*The "hearing" referred to in the opinion below was not on the issue of psychiatric disability, but whether the appellant was eligible, under her Union contract, for an ad hoc administrative review of the respondent's action. The arbitrator held she was not. (R.,100).

Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2596, 2600-2601.

The language in Board of Regents v. Roth, 408 U.S. 4, 92 S. Ct. 2701, 33 L. Ed. 2d 548 is directly applicable to the case at bar. The Court held at pp. 560-561 U.S.:

> "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests - property interests - may take many forms.
>
> "Thus the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility to them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. Goldberg v. Kelly, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011. See Fleming v. Nestor, 363 U.S. 603, 611, 4 L. Ed. 2d 1435, 1444, 80 S. Ct. 1367. Similarly in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, Slochower v. Board of Education, 350 U.S. 551, 100 L. Ed. 92, 76 S. Ct. 637, and college professors and staff members dismissed during the terms of their contracts, Wiman v. Updergraff, 344 U.S. 183, 97 L. Ed. 216, 73 S. Ct. 215, have interests in continued employment that are safeguarded by due process. Only last year the Court held that this principle 'proscribing summary dismissal from public employment without hearing or inquiry required by due process' also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment. Connell v. Higginbotham, 403 U.S. 207, 29 L. Ed. 2d 418, 420, 91 S. Ct. 1772."

See also, Perry v. Sinderman, 408 U.S. 593, 92 S. Ct. 2994, 33 L. Ed. 570.

The appellant's right to pursue her profession is absolute in the absence of a ruling based upon a record

established in accordance with due process standards. The unconstitutionality of the New York Statute and the actions of the officials herein is clear.

> Graham v. Richardson, 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534.
>
> Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S. Ct. 624, 95 L. Ed. 817.
>
> Goldberg v. Kelly, supra,
>
> Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 31 L. Ed. 2d ____.
>
> Wisconsin v. Constantineau, 400 U.S. 433, 91 S. Ct. 507, 27 L. Ed. 2d 515.

In a case almost directly on point with the facts here presented, it was held in Stewart v. Pearce, 484 F. 2d (9th cir. 1973), at p. 1034:

> "The order by the College to report for a psychiatric examination implied that there existed both reasonable grounds for the order and mental unfitness for the job. Moreover, the order created a 'stigma, an official branding' of Stewart. Wisconsin v. Constantineau, supra at 437, 91 S. Ct. 507. 'Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented' Id. Cf. Jablon v. Trustees of California State Colleges, 482 F. 2d 997 (9th Cir., 1973).

Even more directly on point is the decision of the United States District Court for the Southern District of New York in Snead v. Department of Social Services of the City of New York, et al., 355 F. Supp. 764. The plaintiff in the Snead case successfully challenged the consti-

tutionality of Section 72 of the New York Mental Hygiene Law. This section is substantially identical with the statute challenged here. It provided for the requirement of a mental examination of an employee when in the judgment of an appointing authority, the employee was not mentally fit to perform his duties. The medical officer was to be selected by the state or municipal service authority having jurisdiction over the employee. If the examining medical officer certified that the employee was not mentally fit to perform his or her duties, the appointing authority could then place the employee on leave of absence without pay for a period up to one year.

The Snead court held the placing of the employee on involuntary medical leave of absence might seriously damage his standing and associations in his community and imposed a stigma or other disability that foreclosed his freedom to advantage of other employment opportunities under the Roth decision, supra. The court further held that an adversary hearing to determine not only the accuracy of the finding of mental unfitness but also the accuracy of the charges which first prompted the recommendation for examination.

The appellant here has placed both of the factors held relevant in Snead in issue here and she is entitled to judgment.

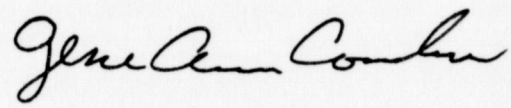
The complaint submits a substantial constitutional

question for determination, Cf. Bell v. Hood, 327 U.S. 687, 66 S. Ct. 773, 90 L. Ed. 939; Goosby v. Osser, 409 U.S. 512, 935 S. Ct. 854, 35 L. Ed. 2d 36; Hagans v. Lavine, ___ U.S. ___, 94 S. Ct. 1372, ___ L. Ed. 2d ___ (decided March 25, 1974).

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REVERSED AND JUDGMENT GRANTED APPELLANT

Respectfully submitted,



Gene Ann Condon
Attorney for Appellant

Dated: New York, New York
June , 1974

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THREE COPIES OF THE WITHIN PAPER HAVE THIS DAY BEEN PROCURED AT THE OFFICE OF THE CORPORATION COUNSEL

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CORPORATION COUNSEL